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Supreme Court, U.S.
FILED
DEC 19 2008
OFFICE OF THE CLERK

No. 08-580

In the
Supreme Court of the United States

CITY OF CINCINNATI,
Petitioner,

v.

CLEVELAND CONSTRUCTION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Ohio Court of Appeals, First Appellate District

PETITIONER'S REPLY BRIEF

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December 19, 2008

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QUESTIONS PRESENTED

I. Whether a contractor bidding for a municipal construction contract on equal footing with other bidders can state a facial equal protection claim against the municipality's discretionary procurement system where contracts are awarded to the lowest and best bidder based on evaluating a non-exhaustive list of factors that may include the bidders' compliance with equal opportunity and non-discrimination protections for minority-owned and women-owned subcontractors.

II. Whether strict or other heightened judicial scrutiny applies to a contractor's facial equal protection claim against a municipality's discretionary procurement system providing that all bidders compete *ex ante* on equal footing but allowing the municipality to consider, as part of a non-exhaustive list of factors, the bidders' compliance with equal opportunity and non-discrimination protections for minority-owned and women-owned subcontractors.

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STATEMENT OF THE CASE

The City hereby incorporates by reference the facts and the procedural posture as outlined in the statement of the case provided in its Petition for Writ of Certiorari (the "Petition").[1] The City also reiterates that Cleveland Construction's *as-applied* equal protection challenge to the City's procurement system was unsuccessful in the trial court.[2] The appellate court, which focused on Cleveland Construction's facial equal protection challenge to the City's procurement system, did not expressly overrule the trial court on the as-applied issue.[3] The Ohio Supreme Court declined to accept the equal protection issues for consideration,[4] despite Cleveland Construction's post-decision motion to clarify or reconsider those issues.[5] Consequently, with respect to equal protection, the only issue before this Court for consideration is Cleveland Construction's *facial* equal protection challenge to the City's procurement system,[6] which the City now urges this Court to reconsider.

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[1] Petition for Writ of Certiorari pp. 4-8.

[2] App. 57a-58a.

[3] *Id.* at 35a-39a.

[4] *Id.* at 1a.

[5] Cleveland Construction's Motion to Clarify, and in the alternative, for Reconsideration to the Ohio Supreme Court can be found online at http://www.sconet.state.oh.us/tempx/622716.pdf.

[6] Both the trial court and the appellate court found the City's procurement system facially unconstitutional. App. 35a-39a; 57a-58a.

REASONS FOR GRANTING THE WRIT

I. An Unsuccessful Bidder For A Municipal Contract Cannot State A Cognizable Facial Equal Protection Claim Where There Are Possible Lawful Applications Of The Municipality's Discretionary Procurement System.

II. This Court's Racial Classification Equal Protection Decision In *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007), Means That The Lower State Courts Overbroadly Construed Relevant Principles, Erroneously Applied Strict Judicial Scrutiny, And Unjustifiably Facially Enjoined The City's "Lowest And Best Bid" Procurement System.

III.There Is A Split Of Federal Authorities On The Question Whether Strict Judicial Scrutiny Applies To A Municipality's Discretionary "Lowest And Best Bid" Procurement System That Places Bidding Contractors On Equal Footing *Ex Ante* And Permits Consideration Of The Bidders' Compliance With Its Equal Opportunity And Non-Discrimination Protections For Minority-Owned And Women-Owned Subcontractors.

ARGUMENT

Cleveland Construction bases its argument for denial of the City's Petition on a misreading of the relevant case law as well as a misinterpretation of the City's argument for granting the Petition. The central issue before this Court is the distinction between a governmental decision that is *mandated* based on race or gender and a governmental decision that is based upon permissive evaluation of a non-exhaustive list of

factors that may or may not include compliance with equal opportunity and non-discrimination provisions.

There are two key differences that Cleveland Construction has failed to recognize in its response to the City's Petition. First, there is a difference between a facial equal protection challenge, in which the plaintiff must demonstrate that there is no set of circumstances under which the program at issue could be lawfully applied,[7] and an as-applied equal protection challenge, in which the plaintiff must demonstrate that the program was applied unlawfully in a particular situation. Second, there is a difference between a program that is subject to strict scrutiny by virtue of dictating a result based on mandatory consideration of race and gender and a program that is not subject to strict scrutiny because it does not require a certain result or outcome based on these classifications.

The City's procurement system is by nature a discretionary program that provides the purchasing agent with flexibility to award a contract based upon the evaluation of a non-exhaustive list of factors. Within that list of non-exhaustive factors, the City purchasing agent *may*, but is not *required* to, consider compliance with the City's equal opportunity initiatives for minority and women-owned businesses. The equal opportunity and non-discrimination provisions of the City's procurement system are not a quota or a set-aside. Moreover, all bidders for City contracts are placed on equal footing *ex ante* with respect to complying with these initiatives as well as

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[7] *United States v. Salerno*, 481 U.S. 739, 745 (1987).

any other factors that may be evaluated by the purchasing agent in awarding contracts.

In this case, it is uncontroverted that Cleveland Construction was not awarded the Convention Center drywall contract because it failed to include the specified race-neutral and gender-neutral percentage of small businesses in its bid.[8] The City's equal opportunity and non-discrimination provisions were not applied to deprive Cleveland Construction of the drywall contract.

Assuming *arguendo* that an as-applied equal protection challenge to the City's procurement system was before this Court, Cleveland Construction could not succeed on that challenge because the provisions of the system at issue were not applied to deprive Cleveland Construction of the contract. More significantly, however, neither Cleveland Construction nor any other bidder can succeed on a facial equal protection challenge to the City's procurement system, because the fact that the subject provisions as applied did not act to deprive Cleveland Construction of the drywall contract means that the system can be lawfully applied. In sum, the discretionary nature of the City's procurement system makes it impossible for either Cleveland Construction or any other bidder to succeed on a facial equal protection challenge to the system.

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[8] App. 4a; 31a; 71a.

CONCLUSION

Despite Cleveland Construction's contentions to the contrary, this Court's recent decisions in *Grutter v. Bollinger*[9] and *Parents Involved in Community Schools v. Seattle School District No. 1*[10] have created a distinction between, on the one hand, race and gender-based initiatives that are subject to strict scrutiny and, on the other hand, discretionary programs that may include compliance with equal opportunity and non-discrimination provisions as part of a non-exhaustive list of evaluative criteria. The City asks that the Court acknowledge this distinction by granting the City's Petition and clearly establishing the lines to which it has alluded in the relevant case law. In the alternative, the City asks that the Court grant the City's Petition and remand to the lower courts for further consideration in light of the *Parents Involved in Community Schools* decision.

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[9] 539 U.S. 306 (2003).

[10] 127 S. Ct. 2738 (June 28, 2007).

Respectfully submitted,

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